No._____

IN THE

Supreme Court of the United States

October Term, 1972

HENRY FRANCIS WALTERS,

Petitioner

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE
SUPREME COURT of the UNITED STATES
1973

UNITED STATES OF AMERICA,

Appellee

v.

No. .....

HENRY FRANCIS WALTERS,

Appellant

Petition for Writ of Certiorari to the
United States Circuit Court of Appeals
for the 6th Circuit

BRIEF FOR APPELLANT

Appellant, HENRY FRANCIS WALTERS, respectfully prays this Court to issue a Writ of Certiorari to review the final decisions of the United States Circuit Court of Appeals for the 6th Circuit entered on December 1, 1972 and on January 3, 1973.

OPINIONS BELOW

The opinions of the Circuit Court of Appeals for the 6th Circuit are set forth at page A-1, including the denial of the Petition for Rehearing dated January 3, 1973, at page A-2.

JURISDICTION

The jurisdiction of the Court is invoked under 28 United States Code Section 1254.

QUESTIONS PRESENTED

I. WHETHER THE LOWER COURT ERRED IN GRANTING THE GOVERNMENT'S MOTION FOR A CONSOLIDATED TRIAL?
The lower courts answered "no."
Henry Francis Walters, says the answer is "yes."

II. WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION FOR A SEVERANCE OF CO-DEFENDANT?
The lower courts answered "no."
Henry Francis Walters, says the answer is "yes."

STATEMENT OF FACTS

On July 21, 1970, the grand jury in the United States District Court, Eastern District of Michigan, Northern Division, returned a fourteen (14) count indictment against Henry Francis Walters and one Phillip C. Hobdy of knowingly and unlawfully possessing certain counterfeit Federal Reserve Notes as indicated in the indictments, as follows:

On 21 July 1970 the grand jury in the United States District Court, Easter District of Michigan, Northern Division, returned a fourteen (14) count indictment against Henry Francis Walters, as follows:

Count One

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 802 counterfeit One Dollar Federal Reserve Notes,1969, Check Letter H, Face Plate No. 90. Back Plate 1226, Federal Reserve Bank of Chicago, Illinois, Serial No. G38556886B; in violation of Section 472, Title 18, United States Code.

Count Two

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 476 counterfeit Five Dollar Federal Reserve Notes, 1969, Check Letter D, Face Plate No. 32, Back Plate No. 102, Federal Reserve Bank of Chicago, Illinois, Serial No. G81911759A; in violation of Section 472, Title 18, United States Code.

Count Three

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 323 counterfeit Ten Dollar Federal Reserve Notes, 1963A, Check Letter F, Face Plate No. 51, Back Plate No. 37, Federal Reserve Bank of Chicago, Illinois, Serial No. G91785997B; in violation of Section 472, Title 18, United States Code.

Count Four

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 705 counterfeit Ten Dollar Federal Reserve Notes 1963A, Check Letter

H, Face Plate No. 22, Back Plate No. 18, Federal Reserve Bank, Atlanta, Georgia, Serial No. F12335542A; in violation of Section 472, Title 18, United States Code.

Count Five

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 1290 counterfeit Twenty Dollar Federal Reserve Notes, 1963A, Check Letter B, Face Plate No. 53, Back Plate No. 62, Federal Reserve Bank, San Francisco, California, Serial No. L64188-532B; in violation of Section 472, Title 18, United States Code.

Count Six

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 1,339 counterfeit Twenty Dollar Federal Reserve Notes, 1963A, Check Letter G, Face Plate No. 46, Back Plate No. 60, Federal Reserve Bank of Chicago, Illinois, Serial No. G54055695B; in violation of Section 472, Title 18, United States Code.

Count Seven

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 1315 counterfeit Twenty Dollar Federal Reserve Notes, 1963A, Check Letter F, Face Plate No. 57, Back Plate No. 62, Federal Reserve Bank of Cleveland, Ohio, Serial No. D70673113A; in violation of Section 472, Title 18, United States Code.

Count Eight

That on or about the 25th day of June 1970 in the Eastern

District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters did sell, transfer and deliver to Special Agent Ronald V. Germain 802 counterfeit One Dollar Federal Reserve Notes, 1969; Check Letter H, Face Plate No. 90, Back Plate No. 1226, Federal Reserve Bank of Chicago, Illinois, Serial No. G38556886B, with intent that the same be passed, published and used as true and genuine notes, and Henry Francis Walters then knew the notes were counterfeit; in violation of Section 473, Title 18, United States Code.

Count Nine

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters did sell, transfer and deliver to Special Agent Ronald V. Germain 476 counterfeit Five Dollar Federal Reserve Notes, 1969; Check Letter D, Face Plate No. 32, Back Plate No. 102, Federal Reserve Bank, Chicago, Illinois, Serial No. G81911759A; with intent that the same be passed, published and used as true and genuine notes, and Henry Francis Walters then knew the notes were counterfeit; in violation of Section 473, Title 18, United States Code.

Count Ten

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters did sell, transfer and deliver to Special Agent Ronald V. Germain 323 counterfeit Ten Dollar Federal Reserve Notes, 1963A; Check Letter F, Face Plate No. 51, Back Plate No. 37, Federal Reserve Bank of Chicago, Illinois, Serial No. G91785997B, with intent that the same be passed, published and used as true and genuine notes, and Henry Francis Walters then knew the notes were counterfeit; in violation of Section 473, Title 18, United States Code.

Count Eleven

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters did sell, transfer and deliver to Special Agent Ronald V. Germain 705 Counterfeit Ten Dollar Federal Reserve Notes, 1963A, Check Letter H, Face Plate No. 22, Back Plate No. 18, Federal Reserve Bank, Atlanta, Georgia, Serial No. F12335542A, with intent that the same be passed, published and used as true and genuine notes, and Henry Francis Walters then knew the notes were counterfeit in violation of Section 473, Title 18, United States Code.

Count Twelve

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters did sell, transfer and deliver to Special Agent Ronald V. Germain, 1290 counterfeit Twenty Dollar Federal Reserve Notes, 1963A; Check Letter B, Face Plate No. 53, Back Plate No. 62, Federal Reserve Bank of San Francisco, California, Serial No. L64188532B, with intent that the same be passed, published and used as true and genuine notes, and Henry Francis Walters then knew the notes were counterfeit; in violation of Section 473, Title 18, United States Code.

Count Thirteen

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters did sell, transfer and deliver to Special Agent Ronald V. Germain, 1339 counterfeit Twenty Dollar Federal Reserve Notes, 1963A; Check Letter G, Face Plate No. 46, Back Plate No. 60, Federal Reserve Bank of Chicago Illinois, Serial No. G54055695B, with intent that the same be passed, published and used as true and genuine notes, and Henry Francis Walters then knew the notes

were counterfeit; in violation of Section 473, Title 18, United States Code.

Count Fourteen

That on or about the 25th day of June 1970 in the Eastern District of Michigan, Northern Division, at Alma, Michigan, Henry Francis Walters did sell, transfer and deliver to Special Agent Ronald V. Germain, 1315 counterfeit Twenty Dollar Federal Reserve Notes, 1963A; Check Letter F, Face Plate No. 57, Back Plate No. 62, Federal Reserve Bank of Cleveland, Ohio, Serial No. D70673113A, with intent that the same be passed, published and used as true and genuine notes, and Henry Francis Walters then knew the notes were counterfeit; in violation of Section 473, Title 18, United States Code.

and on the same date the grand jury returned a six count indictment against Phillip C. Hobdy as follows:

Count One

That on or about the 26th day of June 1970, in the Eastern District of Michigan, Northern Division at Alma, Michigan, Phillip C. Hobdy, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 10 counterfeit Ten Dollar Federal Reserve Notes, 1963A, Check Letter F, Face Plate No. 51, Back Plate No. 37, Federal Bank of Chicago, Illinois, Serial No. G31974328B; in violation of Section 472, Title 18, United States Code.

Count Two

That on or about the 25th day of June 1970, in the Eastern District of Michigan, Northern Division at Alma, Michigan, Phillip C. Hobdy, did make a photographic negative designed for the printing of United States obligations, and said photographic negative containing the face impressions of the following counterfeit notes:

Fifty Dollar, Series 1969, Check Letter B, Face Plate No. 1. Federal Reserve Bank of Chicago.

Twenty Dollar, Series 1963A, Check Letter A, Face Plate No. 6, Federal Reserve Bank of Chicago.

Twenty Dollar, Series 1963A, Check Letter A, Face Plate No. 6, Federal Reserve Bank of Chicago.

Twenty Dollar, Series 1963A, Check Letter A, Face Plate No. 6, Federal Reserve Bank of Chicago.

Twenty Dollar, Series 1963A, Check Letter A, Face Plate No. 6, Federal Reserve Bank of Chicago.

Twenty Dollar, Series 1963A, Check Letter A, Face Plate No. 31, Federal Reserve Bank of Chicago.

in violation of Section 474, Title 18, United States Code.

Count Three

That on or about the 25th day of June 1970, in the Eastern District of Michigan, Northern Division at Alma, Michigan, Phillip C. Hobdy, defendant herein, did, with intent to defraud, knowingly and unlawfully posess a photographic negative containing the face impression of counterfeit notes, the same as described in Count Two and herein incorporated by reference, with intent to use said photographic negative for the counterfeiting of United States obligations; in violation of Section 474, Title 18, United States Code.

Count Four

That on or about the 26th day of June 1970, in the Eastern District of Michigan, Northern Division at Alma, Michigan, Phillip C. Hobdy, defendant herein, did, with intent to defraud, knowingly and unlawfully possess one aluminum offset printing plate bearing the face impressions of counterfeit notes, the same as described in Count Two and herein incorporated by reference, with intent to use said aluminum offset printing plate for the counterfeiting of United States obligations; in violation of Section 474, Title 18,

United States Code.

Count Five

That on or about the 26th day of June 1970, in the Eastern District of Michigan, Northern Division at Alma, Michigan, Phillip C. Hobdy, defendant herein, did, with intent to defraud, knowingly and unlawfully did manufacture 3,325 separate sheets containing the face impressions of counterfeit notes, the same as described in Count Two and herein incorporated by reference, without the direction of some proper official of the United States; in violaton of Section 474, Title 18, United States Code.

Count Six

That on or about the 26th day of June 1970, in the Eastern District of Michigan, Northern Division at Alma, Michigan, Phillip C. Hobdy, defendant herein, did, with intent to defraud, knowingly and unlawfully possess 3,325 separate sheets containing the counterfeit Federal Reserve Notes as described in Count Two and herein incorporated by reference; in violation of Section 472, Title 18, United States Code.

On November 9, 1971, a Motion for consolidated trial pursuant to Rule 13 of the Federal Rules of Criminal Procedure, Title 18, USCA was presented to the Court. The government's brief indicated as a basis for consolidation that the indictments against Phillip C. Hobdy and Henry Francis Walters related to a single transaction. Strong objections to the Motion to consolidate were filed on Appellant's behalf indicating, **inter alia:** That Phillip C. Hobdy and Henry Francis Walters were charged with distinct felonies, that the offenses charged against Phillip C. Hobdy occurred at a differant time than the offenses charged against Appellant, and that the charges against Phillip C.

Hobdy were in no way related to, nor did they arise out of, a single transaction or series of transactions with Appellant. The Federal District Court allowed the government's Motion to consolidate the cases.

Prior to trial on November 11, 1971, a Motion for Severance of Defendants was filed on behalf of Henry Francis Walters. The basis of this motion was Rule 14 of the Federal Rules of Criminal Procedure and the prejudice to Appellant, Henry Francis Walters, caused by a joinder of Defendants. The trial court denied Appellant's Motion and the cases proceeded to trial by jury. Phillip C. Hobdy took the witness stand on his own behalf and was found guilty on all six counts of the Indictment and Appellant, Henry Francis Walters, did not take the witness stand and was found guilty on all 14 counts of the Indictment.

From the selection of the jury and throughout the entire trial several unusual occurrences developed:

> Juror No. 13, Mrs. Gretchen M. Hartt, was asked certain questions and she gave these answers:
>
> "THE COURT: Has your husband or you or any member of your immediate family ever been involved in law enforcement work?
>
> JUROR HARTT: Yes, sir.
>
> THE COURT: Who?
>
> JUROR HARTT: My son.
>
> THE COURT: What does he do?
>
> JUROR HARTT: He is a chief of police in Forest Township.
>
> THE COURT: How long has he followed that work?
>
> JUROR HARTT: About five years."
>
> (ps A-3, A-4)

Juror Hartt further testified that, although her son had been the chief of police approximately five years he had been a deputy much longer and that she participated in

her son's police work by answering the telephone.

(ps A-6, A-7)

Following selection of the jury, a motion was made by Attorney Tracy to permit Attorney Phillip Smith, a member of the State Bar of Michigan and of the Federal Courts, to appear as counsel in behalf of Appellant Henry Francis Walters at no compensation. The court appeared provoked and questioned Attorney Smith (ps A-8, A-9):

THE COURT: Have him come forward.

Mr. Smith are you admitted to practice before this court?

MR. SMITH: Yes. Sir, I am.

THE COURT: Have you been advising Mr. Walters in this matter?

MR. SMITH: I have consulted with him about it but only relative to the business.

THE COURT: I understand from statements made by Mr. Tracy that it was at your suggestion certain motions were made in this court.

MR. SMITH: I beg your pardon?

THE COURT: I understand from statements made by Mr. Tracy this morning that certain actions were taken on behalf of his client, Mr. Walters, because of suggestions you have made.

MR. SMITH: To an extent that is true. I was shown a motion for consolidation the night before last about 11:00 o'clock in the evening and I understood there was to be a severance motion filed in this matter for separate trials.

THE COURT: That was your suggestion, wasn't it?

MR. SMITH: I think it's a good idea.

THE COURT: Well, so Mr. Tracy said. He said it was your suggestion.

MR. SMITH: I suggested all along to these people

they have separate trials.

THE COURT: Yes, I understand that but I am just wondering what your status in this case is. Are you in it or out of it? If you are in the case and you are advising somebody appearing in this court it seems to me you should have entered an appearance.

******

MR. SMITH: They are clients of mine and asked me several questions.

*****

MR. SMITH: I think this is done all the time. General Motors does it.

THE COURT: Let's not go into General Motors, I am not concerned about General Motors. They are not a party in this litigation. The attorney of record in this case is Mr. Tracy.

MR. SMITH: That's correct.

THE COURT: I wonder how it comes about you are advising his client so far as this case is concerned.

MR. SMITH: I have been asked certain questions by the Walters.

THE COURT: Why didn't you tell them they have their own attorney in this case?

MR. SMITH: I have done that.

(ps A-10, A-11)

The court continued to interrogate Attorney Smith in an apparent hostile manner merely because Appellant, Henry Francis Walters, urged Attorney Smith to file an appearance and assist in representing him (p A-12).

Initially, "a whole mass" of the government's proposed exhibits were on the top of a table in plain view of the jury, and this was objected to as being prejudicial to Appellant's case (ps. A-13, A-14). The trial court overruled every single motion made by Appellant as attested to by the trial transcript.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULES INVOLVED

The Constitutional provisions relevant to this case are the Fifth and Fourteenth Amendments of the United States Constitution. The Federal Rules under consideration are Rule 8 (b), 18 United States Code Annotated; Rule 13, 18 United States Code Annotated, and Rule 14, 18 United States Code Annotated.

ARGUMENT

I

THE COURT BELOW ERRED IN AFFIRMING THE TRIAL COURT'S ORDER ALLOWING THE TWO INDICTMENTS TO BE TRIED TOGETHER SINCE THE OFFENSES AND THE DEFENDANTS COULD NOT HAVE BEEN JOINED IN A SINGLE INDICTMENT.

Under Rule 13 of the Federal Rules of Criminal Procedure the Court may order two or more Indictments to be tried together if the offenses and the defendants, if more than one, could have been joined in a single Indictment.

Rule 13 must be read in conjunction with Rule 8(b) of the Federal Rules of Criminal Procedure which authorizes the joinder of two or more defendants in the same Indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. See **Daley v. United States** (1956), 231 F.2nd. 123.

In **United States v. Gougis** (CA 7, 1967), 374 F.2nd, involving the unlawful possession and sale of narcotics, the claim was made that multiple defendants were charged with offenses which were in no way connected and then tried together and that such improper joinder was highly prejudicial to the defendant. the Appeals Court in holding that there had been a mis-joinder of defendants said at

page 762:

> "In a case of a violation of Rule 8(b) there is substantial authority holding that joinder is per se improper where multiple defendants are charged with offenses in no way connected."

It is crystal clear from the following documentary facts that it was extremely prejudicial to force Appellant Henry Francis Walters to trial with his co-defendant, Phillip C. Hobdy when it was a violation of Rule 8(b).

In the case before the lower courts, Phillip C. Hobdy was charged with offenses in Counts Two through Six which were not charged against Henry Francis Walters.

Count One of the Indictment against Phillip C. Hobdy alleges unlawful possession by Phillip C. Hobdy of a certain Federal Reserve Note.

Henry Francis Walters was not charged with possession of this note, although he was charged in Counts One through Seven with possession of certain Federal Reserve Notes which were in no way connected with the note allegedly manufactured or possessed by Phillip C. Hobdy.

Henry Francis Walters was charged with 14 criminal violations and in none of these was it alleged that Phillip C. Hobdy Participated in the act or transactions constituting the offense or offenses.

Likewise Phillip C. Hobdy was charged with six violations of the Federal Criminal Code and in none of the violations was it alleged that Henry Francis Walters participated in the act or transactions constituting the offense or offenses.

The trial court in its first statement to the jury on consolidation (Transcript page 50) stated (p A-15):

> "These two men are being charged and being tried jointly before you in a consolidated case charging each of them with separate violations of the federal criminal code."

This was a prejudicial error.

In **Ingram v. United States,** (CA4, 1959), 272 F. 2nd 567 a case involving the concealing and possessing of non-tax paid liquor, the Court made its decision mandatory in application at page 569:

> "Rule 8(b) specifically states when it is permissible to join defendants in a single indictment and trial. It provides that two or more defendants may be jointly charged if they are alleged to have participated in the same act or transaction. The necessary inference from this is that they may not be jointly indicted or tried in the absence of a common act or transaction . . .but the joinder of defendants and offenses totally unconnected is prohibited by Rule 8(b). This is not a matter of discretion, but the statutory language and the decided cases make this clear."

The Court further said at 570:

> "In other words, where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact and the judge has no discretion to deny relief."

In **United States v, Jorgenson** (CA 10, 1971), 451 F. 2nd 516, the Court stated at 522:

> "Joinder of multiple defendants is proper **only if there is proof of their joint participation in the same act or transaction** or series of transactions."
>
> (Emphasis added.)

In United States v. Parson (CA 9, 1971), 452 F.2nd 1007, the Court said at page 1008:

> "Joinder of defendants in the same Indictment is only permitted where the persons charged participate in the same act or series of acts constituting the offense or offenses."

In **Kidwell v. United States,** 38 App. DC 566 (1912), at

page 570, the Court stated:

> "It is doubtful whether separate and distinct felonies, not arising out of the same transaction or dependant upon the same proof, should ever be consolidated."

In **United States v. Guilla** (1969, W. Dist. Pa.), 304 F. Supp. 30, a case involving embezzlement and the obstruction of justice, the court held that factually unrelated charges against different individuals should ordinarily not be joined in one prosecution.

All of the foregoing controlling cases on this specific ground clearly indicate that this unfair, unjustifiable and unconstitutional trial and conviction and sentence should not be allowed to stand.

Henry Francis Walters submits that on the face of the Indictments there was no connection between the acts charged as having been committed by Phillip C. Hobdy on June 26, 1970, and those acts charged as having been committed by Henry Francis Walters on June 25, 1970.

The several charges in the two Indictments were not against the same persons nor were the defendants Phillip C. Hobdy and Henry Francis Walters alleged to have participated in the same acts or transaction constituting the alleged offenses. Henry Francis Walters further submits that consolidation of trials and joinder of defendants was improper and that the result thereof was highly prejudicial to Henry Francis Walters and that the lower courts should have granted separate trials where Appellant, Henry Francis Walters, would have had a fair and impartial chance to prove his innocence.

II

HENRY FRANCIS WALTERS WAS EXTREMELY PREJUDICED BY THE JOINDER OF DEFENDANTS IN THE INDICTMENT

AND BY FAILURE OF THE LOWER COURT TO GRANT A SEVERANCE OF DEFENDANTS.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> "If it appears that a Defendant or the government is prejudiced by a joinder of offenses or of defendants in an Indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

In **Drew v. United States** (1964), 331 F.2nd 85, a case of robbery and attempted robbery, argument against joinder at page 88 stated:

> "The defendant may be prejudiced for one or more of the following reasons:
>
> (1) He may become embarrassed or confused in presenting separate defenses;
>
> (2) The jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged, or
>
> (3) The jury may cumulate the evidence of the various crimes charged and find guilt."

It is the position of Henry Francis Walters that he was prejudiced by the joinder of his case with that of the case of Phillip C. Hobdy and by the failure of the Court to grant severance. The jury heard nearly two days of testimony by various Federal Agents regarding the manufacture of counterfeit Federal Reserve notes by Phillip C. Hobdy at Henry Francis Walters' place of business. There were introduced into evidence against Phillip C. Hobdy several exhibits consisting of counterfeiting paraphernalia found in Henry Francis Walters' place of business. The surveillance by federal, state and local police officers of Henry Francis

Walters' place of business and the subsequent raid on his place of business by Secret Service Agents and the Michigan State Police was vividly portrayed for the jury. All of this testimony related to offenses charged **solely** against Phillip C. Hobdy. The trial court in a statement to the jury at page 50 of the trial transcript said:

> "Some of the evidence may relate to one, some of the evidence may relate to another of the defendants and perhaps some may relate to both of them. I suggest to you that you try and keep in mind what evidence bears a relationship to the charge against one or the other or both."

Bruton v. United States, 391 US 123 (1968), at page 481, this Honorable Court stated:

> "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their mind.."
> "The naive assumption that prejudicial effects can be overcome by instructions to the jury. . . all practicing lawyers know to be unmitigated fiction."

In **McElroy v. United States**, 164 US 76 (1896), 17 S.Ct. 31, 41 L.Ed. 355, the Court said at page 357:

> "It is clear that the statute does not authorize the consolidation of Indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime differant from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies not provable by the same evidence and in no sense resulting from the same series of acts."

Appellant, Henry Francis Walters, is entitled to the same and equal treatment as this Court extended to **Bruton** and

as it held in **Oyler** v. **Boles,** 368 US 448 (1962); **Snowden** v. **Hughes,** 321 US 1 (1943).

Appellant, Henry Francis Walters, feels that he was deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict. Even the trial court interrogated one witness to such an extent he linked Appellant and the witness, Phillip C. Hobdy, in prison simultaneously (ps. A-16, A-17, A-18, A-19, A-20, A-21, A-22), and this denied Henry Francis Walters a fair and impartial trial.

It is submitted that by not granting a severance of trials the jury heard evidence of crimes charged against Phillip C. Hobdy which would not have been admissible in a separate trial of Henry Francis Walters and that the jury may have very well used the evidence of the crimes charged against Phillip C. Hobdy to infer a criminal disposition on the part of Henry Francis Walters from which was found his guilt of the offenses charged. The jury, after hearing all the evidence against Phillip C. Hobdy relating to printing presses and other counterfeiting paraphernalia located at Henry Francis Walters' place of business, may have cumulated the evidence in both cases to find guilt. The evidence introduced against Phillip C. Hobdy which was in no way related to the evidence against Henry Francis Walters was so prejudicial that a fair trial for Henry Francis Walters was virtually impossible.

CONCLUSION

For all of the foregoing reasons, **inter alia,** Appellant Henry Francis Walters prays this Court to grant this Writ of Certiorari and take any other action this Court feels just to rectify this unfair and erronious trial and conviction.

Respectfully Submitted,
PHILLIP E. SMITH

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Dated February 2nd, 1972

APPENDIX

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A-1

No. 72-1406

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs

ORDER

HENRY FRANCIS WALTERS,

Defendant-Appellant

Before PHILLIPS, Chief Judge, and WEICK, Circuit Judge, and HASTIE*, Senior Circuit Judge.

Upon consideration of the arguments and briefs of counsel, we are of the opinion that the District Judge did not abuse his discretion in consolidating the indictments for trial, or in denying the motion of severance.

It is therefore ORDERED that the judgement of conviction be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT.

James A. Higgins
Clerk

*The Honorable William Henry Hastie, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

A-2

No. 72-1406

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs

ORDER

HENRY FRANCIS WALTERS,

Defendant-Appellant

Before PHILLIPS, Chief Judge, and WEICK, Circuit Judge, and HASTIE*, Senior Curcuit Judge.

Upon consideration, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT.

James A. Higgins
Clerk

*The Honorable William Henry Hastie, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

A-3

Flint, Michigan

Thursday, November 11, 1971

Morning session

(The following occurred during the selection of the jury:)

THE CLERK: Number 13, Gretchen M. Hartt.

THE COURT: Mrs. Hartt, were you able to hear the questions and statements I addressed to the others?

JUROR HARTT: Yes, I was.

THE COURT: Did they reveal in your mind any reason why you should not sit in the case?

JUROR HARTT: No, sir.

THECOURT: Never heard about this matter before today?

JUROR HARTT: No.

THE COURT: Has your husband or you or any member of your immediate family ever been involved in law enforcement work?

JUROR HARTT: Yes, sir.

THE COURT: Who?

JUROR HARTT: My son.

THE COURT: What does he do?

JUROR HARTT: He is a chief of police in Forest Township.

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THE COURT: How long has he followed that work?

JUROR HARTT: About five years.

THE COURT: As a result of his occupation occupying a position of that kind, do you feel that you would be prejudiced in this case?

JUROR HARTT: No.

THE COURT: You are satisfied then in your own mind that you can decide this case based on the evidence and the law in this case?

JUROR HARTT: Yes, your Honor.

THE COURT: The fact that your relative or son is chief of police in that township would not sway your judgment or influence it in any way?

JUROR HARTT: No, sir.

THE COURT: Further peremptories, the prosecution.

MR. SWIRTZ: The Government is satisfied with the jury as it is now composed, your Honor.

THE COURT: Mr. Hobdy?

MR. MILLER: Your Honor, Mr. Hobdy will excuse Juror No. 10, Mrs. Schmidt.

THE COURT: You may step down.

(Juror in Seat 10, Mrs. Schmidt, excused.)

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MR. MILLER: Your Honor, I would like to ask a couple questions of Mrs. Hartt, Juror No. 7.

THE COURT: You may.

MR. MILLER: Your son is a chief of police?

JUROR HARTT: In Forest Township.

MR. MILLER: How long has he been in this capacity?

JUROR HARTT: I don't know, I think three or four years as chief of police. He has been a deputy longer than that.

MR. MILLER: Does he live in your house with you?

JUROR HARTT: No.

MR. MILLER: Has he lived away from your house ever since he has been a chief of police?

JUROR HARTT: Not all of the time.

MR. MILLER: Part of the time he lived there he was a chief of police?

JUROR HARTT: Yes.

MR. MILLER: Would he discuss cases with you from time to time?

JUROR HARTT: We had the police phone in our

home for a while.

MR. MILLER: Did he ever discuss problems of the police department with you?

JUROR HARTT: No.

MR. MILLER: Did you participate in any way in the police work yourself?

JUROR HARTT: I answered the phone for a period of a week. I was the answering service for the township for a period of a week.

MR. MILLER: Is your son the only police officer in the township?

JUROR HARTT: No, there are four others.

MR. MILLER: Have there been times when the others have come to your house on social occasions?

JUROR HARTT: It was always police business.

MR. MILLER: They did conduct quite a lot of police business?

JUROR HARTT: Not in my home. It was always done outside the home.

MR. MILLER: Do you feel with this background you could look at this case open mindedly and not be prejudiced toward the case of the prosecution?

JUROR HARTT: I do.

MR. MILLER: If a policeman were to take the

stand and state something and this was in direct conflict with one of the gentlemen being charged, would you be more inclined to believe the policeman rather than the other man?

JUROR HARTT: No, I would not.

MR. MILLER: Nothing further, your Honor.

I would ask the Court to dismiss Mrs. Hartt for cause because of her close association with police work.

THE COURT: The challenge is denied for cause.

MR. TRACY: I join in the challenge.

THE COURT: It may be so understood. The same ruling. You may swear the jury.

MR. TRACY: One further question if I could. I know it has been asked before but looking at the occupation of Mrs. Decker, I will ask the Court to ask her if in her duties at that concession stand she has ever had any problem with counterfeit money?

JUROR DECKER: Never.

MR. TRACY: Thank you.

THE COURT: Swear the jury.

(The jury as selected was sworn to hear the proofs.)

THE COURT: Ladies and gentlemen, you have been sworn to try this case. You have heard no evidence nor even

November 11, 1971
2:10 o'clock, P.M.

(The hearing of the cause was resumed pursuant to the noon recess. The following occurred in the absence of the jury):

MR. TRACY: I would like to herewith file with the Court the severence motion that was orally argued this morning. Secondly, your Honor, my client, Mr. Walters, has informed me over the lunch hour he would like me to request leave of the Court to permit Mr. Phillip Smith of Alma, Michigan, a lawyer of the State Bar of Michigan to appear of counsel in this case for him at no compensation. Mr. Smith is the company attorney for the Alma Record Printing Company. Mr. Smith is present in the courtroom.

THE COURT: Have him come forward.

Mr. Smith are you admitted to practice before this court?

MR. SMITH: Yes, sir, I am.

THE COURT: Have you been advising Mr. Walters in this matter?

MR. SMITH: I have consulted with him about it but only relative to the business.

THE COURT: I understand from statements made by Mr. Tracy that it was at your suggestion certain motions

were made in this court.

MR. SMITH: I beg your pardon?

THE COURT: I understand from statements made by Mr. Tracy this morning that certain actions were taken on behalf of his client, Mr. Walters, because of suggestions you have made.

MR. SMITH: To an extent that is true. I was shown a motion for consolidation the night before last about 11:00 o'clock in the evening and I understood there was to be a severance motion filed in this matter for separate trials.

THE COURT: That was your suggestion, wasn't it?

MR. SMITH: I think it's a good idea.

THE COURT: Well, so Mr. Tracy said. He said it was your suggestion.

MR. SMITH: I suggested all along to these people they have separate trials.

THE COURT: Yes, I understand that but I am just wondering what your status in the case is. Are you in it or out of it? If you are in the case and you are advising somebody appearing in this court it seems to me you should have entered an appearance.

MR. SMITH: I wasn't retained to represent these people in this matter.

THE COURT: Then why did you advise them?

MR. SMITH: They are clients of mine and asked me several questions.

THE COURT: Then why didn't you enter an appearance? See, either way it doesn't seem right to me under the rules. A man being involved in litigation in the court and you represent him you automatically file an appearance so the Court knows you are in the case.

MR. SMITH: I am not attorney of record. I filed no appearance.

THE COURT: I understand that but you have been advising him in connection with the litigation in this court.

MR. SMITH: I think this is done all the time. General Motors does it.

THE COURT: Let's not go into General Motors, I am not concerned about General Motors. They are not a party to this litigation. The attorney of record in this case is Mr. Tracy.

MR. SMITH: That's correct.

THE COURT: I wonder how it comes about you are advising his client so far as this case is concerned.

MR. SMITH: I have been asked certain questions by the Walters.

THE COURT: Why didn't you tell them they have their attorney in this case.

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MR. SMITH: I have done that.

THE COURT: You went beyond that and gave them advice on what steps to take.

MR. SMITH: I have never done that. I talked to Mr. Tracy last night about this very matter. I have advised them on nothing as to what they should do.

THE COURT: You haven't discussed this matter with Mr. Walters?

MR. SMITH: I have discussed this case with Mr. Walters, yes.

THE COURT: And advised him what steps to take in this case?

MR. SMITH: I have advised him he has an attorney and should carry out and do what Mr. Tracy suggests. In fact, I'm the fellow that got Mr. Tracy.

THE COURT: I understand that and having gotten him I would have thought you would have left the conduct of the case to him.

MR. SMITH: I have.

THE COURT: Well, that isn't quite my understanding.

MR. SMITH: I don't know what the Court understands but—

THE COURT: I only understand what appears to

me in discussion at pre-trial conferences and other conferences and during the course of the formal session of this case and that would indicate that while you haven't formally appeared in this case on behalf of Mr. Walters you have been advising him as to what steps to take and in effect have directed Mr. Tracy to take certain steps.

MR. SMITH: They have asked me certain questions and I have attempted to answer them as clients. I will be glad to file a written appearance.

THE COURT: I think you better do that if you intend to get in - if I allow you to get in.

MR. SMITH: If the Court will allow me I will file a written appearance.

THE COURT: Yes. What is the purpose of your intervention in this case at this point? Let me ask you that.

MR. SMITH: I had no intentions of intervening.

THE COURT: You want to file an appearance. You want to appear in this case, don't you?

MR. SMITH: I don't desire to appear. The Walters have requested that I come over here.

THE COURT: For what purpose?

Mr. SMITH: Merely to be here.

THE COURT: Well, I would think your time is more valuable than that, isn't it, if you are merely going to

sit here, I don't see any point in your being here. I assume you have other matters to attend to.

MR. SMITH: I do. I do.

THE COURT: If you intend to participate that is another matter, that is what I intend to get at. What is it you intend to do in this case? What is it you wish to do in this case?

MR. SMITH: I am not in it so anything I wish probably is just my own opinion.

THE COURT: Mr. Tracy says you want to appear as of counsel, is that true or isn't it?

MR. SMITH: The Walters have requested that I come over here. If the Court wishes I will file an appearance. In terms of my participation in the case it would merely be as an observer.

THE COURT: File your written appearance and you may appear as counsel.

MR. SMITH: I will fie it and have it here in the morning. Thank you.

MR. TRACY: Your honor, Mr. Miller and I have a couple short motions. One, we would like to move the exhibits in this case be excluded from the actual courtroom until they are about to be introduced. I noticed this morning in the presence of the jury there was a whole mass of

different exhibits. I think that would have a way of prejudicing the jury. I think there is no, it is by no way certain these exhibits will eventually be admitted.

THE COURT: Where are they?

MR. TRACY: They are now in storage next door. They were piled out on this table and desk.

THE COURT: I didn't see them but perhaps you paid more mind to them than I did.

MR. SWIRTZ: For the record, your Honor, Mr. Tracy requested me a few minutes ago as he has made in his motion and I have excluded from the courtroom all the evidence that we had earlier this day except for four pieces of evidence which I sealed up and which will be admitted in the testimony of the first witness.

THE COURT: All right. Call the jury.

MR. TRACY: Second, we would move all witnesses who will testify in this case be excluded from this courtroom and that they be instructed by this Court not to discuss their testimony with each other until the trial is completed.

THE COURT: Any objection?

MR. SWIRTZ: Yes your Honor. I would object that the witnesses be prohibited from discussing their testimony with each other inasmuch as they are law enforcement officials and are still working. I would have no objection

MR. SWIRTZ: Yes, your Honor, I will offer it in evidence at this time.

MR. TRACY: I will object, there is a break in the chain of evidence.

THE COURT: The objection is overruled, Exhibit 3, is received.

I should tell the jury at this point that you should be mindful of a few things that you should keep in mind. These two men are being charged and being tried jointly before you in a consolidated case charging each of them with separate violations of a federal criminal code. Some of the evidence may relate to one, some of the evidence may relate to another of the defendants and perhaps some may relate to both of them. I suggest to you that you try to keep in mind what evidence bears a relationship to the charge against one or the other or both.

For example, most of the testimony of this witness down to this point except for a casual mention of Mr. Hobdy has been directed toward his relationship and as evidence to support the charges against Mr. Walters. So you should bear in mind because when and if the time comes that you are called upon to determine the guilt or innocence of either or both of these defendants you will have to judge their cases separately and keep in mind the evidence which bears on

CROSS EXAMINATION

BY MR. TRACY:

Q Mr. Hobdy, in October of 1969, June 26, 1970, during that time did you ever see Mr. Walters operate the Heidelberg press?

A I never actually saw him operate the Heidelberg offset press but on several occasions, one when I was sent down to Morton Grove, Illinois for training for the A. B. Dick Products I was training on one of their copy ing machines and someone had operated it while I was gone.

Q My question was did you ever see Mr. Walters during that time operate tht press?

A No.

MR. TRACY: No further questions.

THE COURT: Mr. Miller.

MR. MILLER: No further questions.

THE COURT: How long had you known Mr. Walters before you went to work for him, or hadn't you known him before that?

A Yes, I had known him before that. I knew him approximately five years.

THE COURT: How did you learn there was a job opening at his place of business?

A I didn't know whether there was a job opening. We just

closed up the restaurant, me and my wife had or were going to buy, and I needed a job to support her and her two boys.

THE COURT: How did you get the job?

A The following day before we closed the shop or the restaurant my wife and I drove up to Alma and I talked to Mr. Walters to see if he could use me.

THE COURT: What did he tell you?

A He told me he had just fired or the man quit, I forget which,I think he was fired, another printer he had working for him and he sure could use me then.

THE COURT: Do you know how long Mr. Walters had been at Alma in this printing shop?

A I read in the different newspapers coming into prison and I saw a picture in the paper when he first bought the printing company.

THE COURT: Do you remember what year that was?

A I beleive 1966.

THE COURT: Do you have any other special training besides printing?

A No real special training, no.

THE COURT: There have been introduced certain exhibits in this case and I believe Exhibit 7, the aluminum plate, you say you saw in that print shop?

A Yes, I did.

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THE COURT: Was that Thursday night or Friday night?

A Friday night.

THE COURT: Where was it when you saw it?

A Still attached to the Heidelberg press.

THE COURT: Ready for action or printing?

A Yes.

THE COURT: During the course of your employment there by Mr. Walters did you have occasion to make similar plates, not of counterfeit money but similar aluminum plates?

A Yes.

THE COURT: That is part of the work there?

A I took the plates and made the plates from the negatives. I did not have anything to do with the masking of the negatives into the sheet.

THE COURT: When you made plates like that you say you burned them. Did you do the previous process too?

A No.

THE COURT: Who did the negative work?

A I did the negative work. Mrs. Walters did the rest. She took the negatives after they were developed, done any opaquing on them and I took the masking sheet—she masked them into the masking sheet and she would give them to me and I would take

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them to the plate burner and transpose the image from the negative onto the plate.

THE COURT: Mr. Miller showed you at least from a distance Exhibit 8, the negative in evidence here. Had you seen that before?

A No, I had not.

THE COURT: You had never seen it before the trial in this case?

A Yes, I'm sorry I did.

THE COURT: When?

A I saw it when we were transferred from the Ithaca Police Post then to the Detroit Office of the U. S. Secret Service.

THE COURT: How often were you paid regularly or wasn't there a regular pay period?

A I was paid once a week on Friday evening.

THE COURT: How much did you have coming that week, the week ending Friday June 26?

A I got a check for sixty-some dollars that week.

THE COURT: When did you get it?

A On Friday evening, I beleive.

THE COURT: What time?

A When I went into the shop, when Mrs. Walters made the check out she would leave it in the typewriter.

THE COURT: What time was it that you got

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the check?

A It was around 8:00, somewhere around 8:00 o'clock.

THE COURT: On Friday?

A Yes.

THE COURT: I thought you hadn't arrived there until later?

A I arrived in Alma around 7:30.

THE COURT: You say you made a decision to leave Alma?

A Yes.

THE COURT: When did you make that decision?

A After going into the shop and seeing counterfeit money or what I believed at the time was counterfeit money laying on the table in the dark room.

THE COURT: When did you tell your wife to get started packing?

A I walked about the Heidelberg press after coming out of the dark room. I saw this plate, what I believe to be the same plate on the Heidelberg press. I started to walk out of the shop and I remembered I would have to have my check if I was going to leave and as soon as I saw it I made up my mind right then I would leave. I walked back into the office of the print shop, picked up my check out of the typewriter and went out.

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THE COURT: I'm not sure when you got your check. Didn't you tell me you got your check about 8:00 o'clock?

A That's what I am saying.

THE COURT: I thought you didn't go back into the place unitl about 9:00 o'clock when Mr. Germane and Mr. Smith drove up in Mr. Walters' car.

A That was on Thursday evening, your Honor.

THE COURT: When you are speaking of the counterfeit money you saw there you say you saw it in the dark room.

A That is where I saw it, yes, sir.

THE COURT: What was the condition it was in?

A In approximately the same condition it is now other than it didn't have any type of bands around it where you could pick up a few sheets and fold them up.

THE COURT: Was it in that box?

A Yes, that same box or one similar to that.

THE COURT: Were these boxes quite common around your place there?

A Yes, they were.

THE COURT: Are those boxes you get supplies in or what?

A In boxes of that type comes paper already cut up to a certain size.

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THE COURT: You get stock in there?

A Right.

THE COURT: I have no other questions. Any other questions by counsel?

MR. SWIRTZ: No, your Honor.

MR. TRACY: No questions.

MR. MILLER: No your Honor.

THE COURT: You may step down.

(Witness excused)

MR. MILLER: We have no further proofs, your Honor. We rest.

THE COURT: The defendant Hobdy rests.

MR. TRACY: May I have a couple minutes to confer with my client?

THE COURT: Certainly. We will take a short recess.

You may retire.

(The jury retired)

THE COURT: We will be in recess.

(A brief recess was taken.)

OPENING STATEMENT BY MR. TRACY:

MR. TRACY: May it please the Court, ladies and gentlemen of the jury: On behalf of my client, Henry Walters, I want to thank you for being here and I want to say

IN THE

SUPREME COURT OF THE UNITED STATES

1973

STATE OF MICHIGAN)

ss:

COUNTY OF GRATIOT)

AFFIDAVIT OF SERVICE

Henry Francis Walters, Appellant herein, through his attorney Phillip E. Smith, after being duly sworn, deposes and says:

That on this date, February 2nd, 1973, true copies of this Motion to Proceed in the Supreme Court of the United States seeking a Writ of Certiorari, along with copies of the appendix, were served on the Mr. Ralph B. Guy, Jr., U.S. District Attorney, Eastern District of Michigan, 817 Federal Building, Detroit, Michigan 48226.

These copies were served via placing same in self-addressed envelopes, with postage fully prepaid, and deposited in the United States mail box.

Phillip E. Smith

Subscribed and sworn to before me this 2nd day of Feb., A. D. 1973.

Carolyn K. Pawson,
NOTARY PUBLIC
Gratiot County, Michigan

My Commission Expires: May 5, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

1973

UNITED STATES OF AMERICA,
Appellee

v.

No.....

HENRY FRANCIS WALTERS,
Appellant

MOTION FOR LEAVE TO PROCEED
FOR WRIT OF CERTIORARI

Now comes Henry Francis Walters, Appellant herein, through his attorney Phillip E. Smith, and respectfully moves this Honorable Court, pursuant to 28 U.S.C. 1915 and Rules 19.1(b), and 39 of this Court, for an Order granting leave to proceed in this cause for a Writ of Certiorari.

The annexed affidavit of Appellant is filed in support of this Motion.

Respectfully submitted,

.....
Phillip E. Smith

BUSINESS ADDRESS:
Phillip E. Smith
Attorney at Law
135 W. Center Street
Alma, Michigan 48801
PHONE: 463-4121

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED

STATE OF MICHIGAN)
ss:
COUNTY OF GRATIOT)

Henry Francis Walters, through his attorney Phillip E. Smith, being duly sworn, deposes and says:

1. This is an affidavit in support of a Motion For Leave in The Supreme Court of the United States requesting review of proceedings in the courts below, including decissions of the United States Court of Appeals for the Sixth Circuit, No. 72-1406, dated December 1, 1972, and a brief order from the same Court, No. 72-1406, dated January 3, 1973, which affirmed the rulings of the United States District Court in granting the Government's motion to consolidate the two defendants for trial purposes when the Appellant herein, Henry Frances Walters, was not remotely connected with any of the Indictments against his alleged co-defendant, Phillip C. Hobdy.

2. The rulings and decisions to consolidate and the denial of severance violated Appellant, Henry Francis Walters', Constitutional rights to a fair and impartial trial and the rulings and decisions were in direct conflict with innumerable decisions of United States Circuit Court of Appeals, **Daley v. United States** (CA Mass, 1956), 231 F.2nd 123; **Ingram v. United States** (CA 4, 1959), 272 F.2nd 567, and also decisions of this Court, **Bruton v. United States** (1968), 391 US 123, 20 L.Ed 2nd 476; **McElroy v. United States** (1896), 164 US 76, 17 S.Ct. 31, 41 L.Ed. 353.

3. Appellant seeks Appellate review on the merits to determine whether said rulings on the consolidation and the timely motion for severance violated his fundamental rights to a trial free of prejudice. A more detailed statement as to the grounds on which he believes he is entitled to relief is set forth in the Petition for Writ of Certiorari filed herewith.

.....

Phillip E. Smith

Subscribed and sworn to before me this 2nd day of Feb., A.D. 1973.

Carolyn K. Pawson,
NOTARY PUBLIC
County of Gratiot

My Commission Expires: May 5, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1077

HENRY FRANCIS WALTERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner attacks the district court's rulings (a) consolidating for trial separate indictments that charged related offenses by him and another defendant, and (b) thereafter refusing to sever their trials.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on seven counts of possessing counterfeit federal reserve notes and on seven counts of selling the same notes, in violation of 18 U.S.C. 472 and 473.[1] He was

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[1] Co-defendant Hobdy was convicted on two counts of possessing counterfeit federal reserve notes, on two counts of possessing materials to be used in counterfeiting United States obligations, and on two counts of manufacturing such materials, in violation of 18 U.S.C. 472 and 474.

sentenced to concurrent terms of imprisonment for five years. The court of appeals affirmed *per curiam* (Pet. App. A1). A petition for rehearing was denied on January 3, 1973 (Pet. App. A2). The petition for a writ of certiorari was filed on February 3, 1973, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the questions sought to be raised do not merit further review.

On the same day that the grand jury returned the fourteen-count indictment against petitioner, it returned a six-count indictment against Philip Hobdy. The court granted the government's pretrial motion to consolidate the two cases and denied petitioner's pretrial motion for a severance. Petitioner did not renew his motion for a severance during the trial.

The evidence showed that prior to June 24, 1970, one Ralph Smith was arrested by Michigan state police for possession of counterfeit United States notes. Smith thereafter agreed to cooperate with the Secret Service and implicated petitioner and Hobdy in a counterfeiting operation. On June 24, Smith introduced Agent Germane, under an assumed name, to petitioner as a prospective buyer of counterfeit currency. After discussing Germane's interest in disposing of $100,000 of counterfeit notes, petitioner took him to his print shop in Alma, Michigan, and introduced him to Hobdy, an employee of the print shop. He also told Germane about some of his methods of producing counterfeit money. (Tr. 27-38, 97, 99, 103-116.)[2]

The next morning, petitioner transferred some of the counterfeit notes to Germane and instructed him in

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[2] "Tr." refers to the trial transcript, a copy of which we are lodging with this Court. "Insts." refers to the instructions to the jury, which are separately paginated at the end of the transcript.

techniques of "aging" the bills (Tr. 36-38, 110-117). Tha evening, Germane furnished petitioner and Hobdy with some genuine notes to be used as patterns in the counterfeiting process. Hobdy then prepared counterfeit notes while petitioner kept a lookout (Tr. 55-62, 123-131). On the following evening, while Hobdy continued the counterfeiting process, Germane gave a prearranged signal to other agents, who arrested Hobdy and searched the print shop pursuant to a warrant (Tr. 67-69). Some of the notes seized from Hobdy were the same type and had the identical serial numbers as some of those given to Germane by petitioner (Tr. 202-203).

Under Rule 13, Federal Rules of Criminal Procedure, separate indictments may be consolidated for trial if the offenses and the defendants "could have been joined in a single indictment or information." Rule 8(b) provides that two defendants may be charged in a single indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Since petitioner and Hobdy were shown to have participated in the same counterfeiting operation, out of which grew the related charges against each, joinder would clearly have been proper under Rule 8. It follows that consolidation of their separate indictments for trial was also proper.

The district court did not abuse its discretion under Rule 14 by denying petitioner's motion for a severance. That rule applies to relief only from *prejudicial* joinder, and there was no prejudice here to any of petitioner's substantial rights. Although he complains of evidence relating to Hobdy's manufacture of counterfeit notes, much of that evidence would have been admissible against petitioner even at a separate trial. Proof relating to the counterfeit operation generally tended to show petitioner's

intent to defraud (18 U.S.C. 472) and his intent that the notes given to the agent would be passed as genuine (18 U.S.C. 473). The court carefully instructed the jury, both during the trial and in its final charge, that any evidence relating solely to one of the defendants must not be considered as against the other (Tr. 50-51; Insts. 21).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.